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IN THE

# Supreme Court of the United States

**October Term, 1957**

No. ~~1124~~ 224

GENERAL ELECTRIC COMPANY,
*Plaintiff-Appellant,*

v.

MASTERS MAIL ORDER COMPANY OF WASHINGTON, D. C., INC.,
*Defendant-Appellee.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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*To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioner, General Electric Company, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case pursuant to its decision dated May 15, 1957.

## Opinions Below

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Reversing Bicks, D.J., 145 F. Supp. 57 (S.D.N.Y., 1956)

## Jurisdiction

The judgment of the Court of Appeals was entered on May 15, 1957. There has been no rehearing or extension of time to petition for certiorari. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## Questions Presented

1. Whether the McGuire Act must be construed to prevent New York from protecting its domestic trade from the unfair trade practice of deliberately advertising, offering for sale, or selling commodities at prices below the prices stipulated in a contract authorized by New York's Feld-Crawford Act, merely because these injurious practices which have their economic impact on New York's domestic trade take place partly in a jurisdiction which has not sought similarly to protect its domestic trade.

2. Whether, for the purposes of the McGuire Act and the Feld-Crawford Act, the question as to where sales are made should be resolved by looking to the jurisdiction where title passes, the jurisdiction where the seller has its "situs" or the jurisdiction where the market is exploited by activities in that market and in which the economic impact of the sales is felt.

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* The appendix hereto will be referred to as Appendix p. —. The record below will be referred to as Masters' App. p. — and GE App. p. —.

3. Whether New York's Feld-Crawford Act protects New York trade from advertising or offering in New York to sell commodities at unfair prices only in those cases where title is to pass in New York or the seller is located in New York, and whether the McGuire Act so limits such protection by New York.

## Statutes Involved

The statutory provisions involved are the McGuire Act and the New York Feld-Crawford Act. They are printed in the Appendix hereto, *infra*, pp. 22-24; 25-27.

## Statement of the Case

This petition seeks review of a judgment of the Court of Appeals for the Second Circuit which reversed the judgment of the United States District Court for the Southern District of New York. The District Court's judgment (Masters' App. pp. 2-4), (based upon a decision constituting findings of fact and conclusions of law [Masters' App. pp. 4-16]), entered after a trial without a jury upon stipulated facts (Masters' App. pp. 17-43; GE App. 1-26), enjoined defendant-appellee, Masters Mail Order from advertising, offering for sale or selling in New York certain electrical appliances manufactured and sold by the plaintiff-appellant, General Electric Company (called herein "GE") which bear GE's trade marks, at prices below the minimum retail resale price established for such appliances by GE pursuant to existing retail resale price maintenance agreements in force in the State of New York. It denied injunctions as to nine other jurisdictions because the proof only established sales

taking place in New York. Jurisdiction of the cause was retained.

GE is engaged in the business of manufacturing and selling electric irons, toasters, fans, clocks and other portable electrical appliances usable wherever electricity is available. These appliances are in fair and open competition with electric appliances of the same general class which are produced and sold by others. The economies of mass production permit these appliances to be sold at reasonable prices. To create a mass market for these appliances, GE has expended and is expending large sums of money in developing and promoting consumer demand for these appliances and has established a valuable reputation and good will for them and for the trademarks under which they are produced and sold (Masters' App. p. 22).

The appliances manufactured by GE are sold by GE to wholesale distributors who in turn sell to thousands of retailers in New York and the other states of the United States for resale to the consuming public. In order to protect the good will and valuable reputation of these appliances and the trademark under which they are sold, not only among consumers, but also among the many thousand retailers who distribute these appliances, and in order to protect its lawful marketing method of widespread distribution which allows GE to benefit from such good will and consumer acceptance, GE has entered into resale price maintenance agreements with retailers throughout the State of New York, as well as in other states where such agreements are permitted by law. Pursuant to those agreements GE established minimum retail resale prices for these appliances (Masters' App. p. 23). When such

minimum resale prices have been established, all retailers within the State who have knowledge of those prices are bound to sell at no less than the prices stipulated pursuant thereto.

GE seeks to foster the small retailer as a purchaser of its appliances and as a salesman for those appliances, so that the retailer's efforts, stimulated by GE's advertising and good will, can create mass distribution. As a result of its policy, a majority of retailers of GE's appliances are small enterprises.

The small retailer wants to stock, display and sell those products because of their trade name and the good will built up by GE. However, it is necessary to provide the small retailer with a reasonable mark-up in order to permit him to stock, display and sell GE products, with the vigor which creates mass distribution and permits mass production.

New York State, by the passage of the Feld-Crawford Act, demonstrated that it desired to provide a reasonable living wage for that independent contractor, the small retailer and protect the good will of the manufacturer which lies at the basis of mass distribution and production.

Congress has twice demonstrated that it wants New York to be able to do so (H. R. Rep. No. 1516, 82nd Cong., 2nd Sess. (1952), pp. 12, 40).

New York has provided for the protection of the interests of the manufacturer and the retailer by the Feld-Crawford Act, which permits GE to preserve its trade name and good will among retailers and consumers and to foster the retailer as a salesman by affording him a reasonable mark-up or wage as an inducement for his efforts.

Congress, by the McGuire Act, has unmistakably provided that New York may enforce this policy as to goods moving in interstate commerce.

On the other hand, defendant, Masters Mail Order Company of Washington, D. C., Inc. (hereafter called "Masters Mail Order"), seeks to wage economic war against the small retailer in New York and to undermine his market for nationally advertised goods. Masters Mail Order believes that it can, without displaying the goods or using any other sales device, sell nationally advertised goods by the sole expedient of announcing its willingness to sell them at lower prices than the retailer who displays or uses sales efforts, can afford (Plaintiff's Exhibits B, C, D, H, I; GE's App. pp. 2, 3, 5, 8, 10).

By so doing, Masters Mail Order obtains a "free ride" on the advertising done by GE and the sales efforts of every retailer who rents space to display GE products or hires salesmen to sell them.

Since July 14, 1952, when the President of the United States signed into law the McGuire Act, General Electric has entered into over 12,000 minimum retail resale price agreements with retailers located in the states of the United States where such agreements are lawful, including over 1,200 in the New York metropolitan area alone. GE has diligently and vigorously enforced those agreements by a widespread program. It has, by notices duly delivered, bound over 175,000 retailers to observe the provisions of those agreements.

One of the lawsuits commenced by GE was brought against Masters, Inc., a New York retailer whose stated policy is to sell Fair Traded merchandise, including that manufactured by GE, at prices below the minimum retail

resale prices established therefor. The New York courts enjoined Masters, Inc. and fined it several times for violation of the injunction (Masters' App. pp. 23-4).

Masters, Inc. then organized Masters Mail Order, of which it owns all the stock. Its officers are the officers of Masters Mail Order (Masters' App. pp. 24-5). Masters Mail Order, by a deliberate campaign conducted nominally from Washington, D. C. (Masters' App. pp. 25-37) which is not a Fair Trade jurisdiction, has continued the assault of Masters, Inc. upon the New York retailer and upon GE's lawful marketing method by handing out in New York through the agency of its parent, Masters, Inc., and by mailing into New York to New York residents chosen in New York by Masters, Inc., mail order forms which recite:

> "MASTERS Mail Order Company of Washington, D. C., Inc. has been established in Washington, D. C. because it is a non Fair Traded area. This means we are permitted in Washington, D. C. to offer you ANYWHERE IN THE COUNTRY SENSATIONAL DISCOUNTS ON FAMOUS BRANDS." (Plaintiff's Exhibit B, Appellee's App. pp. 1-2.)

As the Trial Court found, the officers of Masters Mail Order made their offices in New York and it was in New York that all policy decisions affecting the business were made; it was in New York that all arrangements for initial inventory for Masters Mail Order were made; it was in New York that Masters Mail Order brochures, mailing pieces and order blanks were prepared; it was in New York that the brochures, mailing pieces and order blanks were printed and addressed with the names of New York residents chosen by Masters, Inc.; it was in

New York that the aforesaid mailing pieces were tied and mailed; it was in New York that these aforesaid mailing pieces were received by the customers of Masters, Inc.; it was in New York that Masters Mail Order blanks were distributed over the counter to New York residents by Masters' employees; there was a close relationship between Masters, Inc., the parent corporation, and Masters Mail Order—so close that Masters, Inc. was in fact the agent of Masters Mail Order and performed in New York advertising and made offers to sell on behalf of Masters Mail Order. Further, the Court found that the economic response to the mailing pieces, sales brochures, etc., occurred in New York; that the purchase price was paid by Masters Mail Order customers in New York; that the goods were received in New York and that the effects of the transaction were felt in New York (Masters' App. pp. 4-16).

On the basis of these undisputed findings, the District Court concluded that Masters Mail Order had advertised, offered for sale and sold in the State of New York GE appliances at prices below those stipulated in GE's resale price maintenance agreements with the purpose and effect of exploiting the New York market.

The District Court enjoined Masters Mail Order from continuing its assault upon the New York market. Masters Mail Order appealed.

The Court of Appeals, by a divided vote, reversed the judgment of the District Court holding that New York was powerless to protect against this assault on its domestic market. Three opinions were written. Chief Judge Clark wrote the first. In his decision he stated that Judge Frank, who died after hearing oral argument,

had indicated in an unofficial memorandum that he agreed with Judge Clark's view. Judge Clark's view was that the District Court had erred in finding that title had passed in New York, and that the District Court had erred in giving primary effect to the multiple economic factors involving New York in determining that the place of resale under the McGuire Act and the Feld-Crawford Act was New York.

Judge Clark ignored the manifold activities of Masters Mail Order in New York and that New York was the market affected and the place of economic impact because without citation of authority he read into the McGuire Act a Congressional intent to render the place of passage of title controlling. He thereby forbade New York to prevent intentional injury to New York trade by acts which have their effect in New York and are forbidden by New York law by resort to the fiction that the perpetrators have chosen to have title pass in another jurisdiction. Neither Judge Lumbard nor Judge Waterman agreed with him.

Judge Waterman, who was requested to consider the case by Judge Clark after Judge Frank's death without further oral argument, concurred in the result, but wrote an opinion in which he stated that in his view the question of where title passed was not significant. He too ignored the manifold activities of Masters Mail Order in New York and the fact that New York was the market affected and the place of economic impact. He read into the McGuire Act a Congressional intention to forbid New York from preventing this assault on its trade merely because the perpetrator has a "situs" outside New York. Neither Judge Clark nor Judge Lumbard agreed with him.

Judge Lumbard dissented because, in his view, on the record in this case the District Court had correctly determined that Masters Mail Order had advertised, offered for sale, and sold GE's fair traded appliances in New York at less than the stipulated minimum resale prices, and therefore the District Court had correctly applied the Feld-Crawford Act. He considered the defendant's many activities in New York and the exploitation of the New York market as controlling on the question of where the sale took place.

## Reasons for Granting the Writ

1. The Court of Appeals has decided an important question of Federal law vitally affecting the relationship between and among the states of the United States. Its decision will vitiate the expressed intent of Congress that states be allowed to declare certain acts unfair trade practices and to protect their trade from those acts. Moreover, this important question was decided on grounds unsatisfactory to at least two of the Judges of the panel of three who decided the matter in the Court of Appeals. This Court has not passed on the point.

The important question presented is of far-reaching significance: (a) in so far as it affects the administration of state-enacted minimum resale price maintenance laws, which Congress has declared shall be given full effect by the passage of the McGuire Act; (b) in so far as it affects the value of good will and consumer acceptance which owners of trade-marks such as GE have created by large investments in advertising and maintaining a price structure for their products; (c) in so far as it affects the many thousands of retailers who are bound by fair trade laws in

force in the jurisdiction in which they are located and whose livelihood is threatened by Masters Mail Order's activities; (d) in so far as it affects the more than four hundred retailers in New York alone who are under court orders to sell at no less than the prices stipulated in various resale price maintenance agreements (Masters' App. p. 24).

2. The decision of the Court of Appeals is directly in conflict with the principle of a decision of the highest court of the State of New York which construes the Feld-Crawford Act. Thus, in *Rixor Corp.* v. *Goody*, 307 N. Y. 229 (1954), cert. denied, 348 U. S. 863 (1954), the New York Court of Appeals declared that the New York legislature in passing the Feld-Crawford Act intended to protect the home market to the greatest extent within its powers. (See footnote 3 to p. 49 of the Appendix hereto, wherein Judge Lumbard takes note of this determination.) Moreover, the decision of the Court of Appeals is in direct conflict with *Eastman Kodak Co.* v. *Masters, Inc.*, 153 N. Y. S. 2d, 433 (Sup. Ct., N. Y., 1956, not officially reported). In the *Eastman Kodak* case, the New York Supreme Court construed the Feld-Crawford Act as creating a separate tort for advertising the sale of fair traded commodities at prices below those stipulated in fair trade contracts, whether or not the sales were actually consummated in New York. Such a construction of the statute is compelled by the use of the disjunctive ("advertising, offering for sale *or* selling") in the statutory language. Thus, the decision of the Court of Appeals is in direct conflict with the meaning of the clear language of the Feld-Crawford Act, and New York decisions.

3. The decision of the Court of Appeals is erroneous.

A. The clear words of the McGuire Act and its legislative history indicate that Congress intended that the several states be permitted to determine that violation of resale price maintenance agreements was an unfair trade practice and that each state be permitted to protect its trade from such unfair practices regardless of the interstate character of the transactions.

In weighing the respective rights of the State of New York and the District of Columbia to regulate their internal affairs, the Court of Appeals ignored the economic impact of Masters Mail Order activities upon trade policy of New York and ignored the unfair conduct of Masters Mail Order which occurred within the State of New York and decided that the policy of the State of New York should not be protected.

Support can be found for neither of the grounds advanced to uphold this result.

The Court of Appeals erred in importing into the McGuire Act as the controlling test that title pass in a state which had enacted resale price maintenance laws in order for such laws to have valid application anywhere, if that be the ground for its decision.

The clear words of the McGuire Act lend no support for the view that "resale" as used in that Act was intended to mean "passage of title," a technical concept relating to liability for payment of price and risk of loss, and not to the tort of unfair competition.

The clear words of the statute give no indication that Congress intended that the public policy of Fair Trade states should be avoided by judicial imputation to the parties to a trade practice unfair and illegal in one state of an intention to have title pass in some other jurisdiction,

possibly one that the goods only passed through during delivery.

The Court of Appeals erred in importing into the McGuire Act as the controlling test the novel doctrine that a retailer is exempt from state Fair Trade laws no matter what activity he engages in within the Fair Trade jurisdiction, provided he has an immunizing situs in a non-Fair Trade state or district, if that be the ground of its decision. There is simply no warrant for such a test.

The clear words of the statute give no indication that Congress intended that retailers who merely had a "situs" in a non-Fair Trade state could offer customers anywhere in the country the chance to participate in the very kind of transaction Congress was giving states the right to outlaw.

Although it is accepted law that where the words of a statute are clear, resort to legislative history is not appropriate (*Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 588-9 (1922); *U. S.* v. *Missouri & Pacific Railroad Company*, 278 U. S. 269, 278 (1929); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 201 (1946)), the legislative history demonstrates that Congress did not intend the mere place of passage of title on "situs" of the retailer determinative of the applicability of the state enacted resale price maintenance laws.

The McGuire Act had its origin in a bill introduced by Rep. McGuire, designated H. R. 5767. Rep. McGuire made his intentions clear at the outset:

> "The purpose of this measure is to clarify the status of certain state laws, to affirm within specific limits the right of each state to determine its own policy with respect to the regulation of its internal affairs and to enable each state to protect its domestic

"trade from unfair trade practices." 97 Cong. Rec. 13404 (1951)

Judge Waterman erroneously finds support for his position in the legislative history of the McGuire Act. He does this by relying on the rejection by Congress of a proposed amendment introduced by Congressman Cole of Kansas. The Cole Amendment was rejected, as Judge Waterman indicates, for a variety of reasons. However, Judge Waterman relies upon the controversial phrase: "(3) deliver pursuant to a sale, or otherwise deliver," present in the Cole Amendment but absent from the McGuire Act, as support for his belief that Congress intended that a retailer should be governed only by the Fair Trade law of the jurisdiction in which he is located. The omitted phrase would have permitted interference by one state with the activity of another to an extent not here relevant and not being asked by the plaintiff in this case. It would have prohibited, and was intended to prohibit, a retailer in Missouri (whose normal market includes persons who come across the river from Kansas) who has personally sold in Missouri which had not enacted a fair trade law, to a resident of Kansas a commodity fair traded in Kansas from making a delivery into Kansas pursuant to that sale, all the elements of which take place in Missouri. While relying upon this rejection of an amendment not pertinent here, Judge Waterman omits mention of the rejection by Congress of the Keogh Bill which would have specifically accomplished the objective sought by defendant. The Keogh Bill read in part:

> "*Provided*, That nothing contained herein shall apply to advertisements for sale, offers for sale, or sales which originate from or are directed to or are completed within any State, Territory, or the District of Columbia, where such contracts or agreements as are described herein are not lawful by statute: * * *" (H. R. 6925, 82nd Cong., 2d Sess., as reported out on March 13, 1952.)

The legislative history, therefore, if relevant, favors the view taken by the Trial Court and not that put forward by Judge Waterman.

There is thus no statutory warrant and no reason suggested in the legislative history for giving the term "sell" or "resale" such a restrictive meaning. Obviously, it was the intention of both New York, by the passage of Feld-Crawford, and Congress, by the passage of McGuire, to enable a manufacturer to specify prices at which his commodities were to be distributed by others in those states permitting price maintenance. The term "resale" is used in the statutes for the broad purpose of insuring that not only might sales by agents be controlled as to price but also sales by distributors who had bought, paid for and who actually owned the goods, and who therefore were "reselling" them. It follows that both New York and Congress intended effectively to protect the New York market from all forms of distribution which would undermine this public policy. When Masters Mail Order distributes in New York by means which make it indistinguishable for all practical purposes from a New York retailer and when the transactions involved are factually sales in New York for all practical purposes, the legislative policy should be applied and "resale" should be given a meaning which will effectuate that policy.

B. The Court of Appeals failed to recognize that the wrong complained of by plaintiff is an injury to it from tortious conduct by the defendant and that under recognized principles of conflicts of laws, the law of the place of the injury is the law to be applied.

*Young* v. *Masci*, 289 U. S. 253;
*U. S.* v. *Thayer*, 209 U. S. 39;
*Hunter* v. *Derby Foods*, 110 F. 2d 970 (2d Cir., 1940);
*Horwitz* v. *U. S.*, 63 F. 2d 706 (5th Cir. 1933), cert. denied, 289 U. S. 760;
*State* v. *Davis*, 87 S. E. 262 (W. Va., 1915);
*State* v. *Morrow*, 40 S. C. 221 (1893);
*Restatement, Conflict of Laws*, §377.

In *Young* v. *Masci*, 289 U. S. 253, the Court affirmed a recovery based on injuries received in a New York accident involving a car owned by defendant who had bailed it in New Jersey to a friend. By New York law, unlike the law of New Jersey, the owner of a car is absolutely liable for injuries caused by the negligence of one operating the car with his permission. Mr. Justice Brandeis, speaking for the Court, said:

> "* * * A person who sets in motion in one state the means by which injury is inflicted in another, may, consistently with the due process clause, be made liable for that injury * * *."

So, in *Hunter* v. *Derby Foods*, 110 F. 2d 970 (2d Cir., 1940), the Court imposed liability on a New York concern which sold meat in New York to an Ohio wholesaler. Plaintiff's decedent purchased and ate the meat in Ohio and the Court applied Ohio tort law which placed an absolute liability on the seller of spoiled meat, unlike New York

law which required proof of want of due care. The Court held that sending the food into Ohio was like shooting a firearm across the state line and said:

> "By settled rules of Conflict of Laws, the defendant's liability is measured by the domestic law of Ohio to the same extent as if it had been present and had made the sale there."

In *Hornet* v. *U. S.*, 63 F. 2d 706, the Court declared the sending of lottery receipts into the United States from Mexico illegal and compared them to "bullets that hit their mark" across the line, even though everything complained of occurred while the defendants were "physically in Mexico."

C. The Court of Appeals misconstrued the statutory language common to the Feld-Crawford Act and the McGuire Act.

The Feld-Crawford Act makes it a tort to advertise or offer for sale within the State of New York at below duly stipulated prices, irrespective of whether the sales actually take place there. While there may be limits to this doctrine, the conduct of Masters Mail Order in New York where it is doing business does not require that those limits be here considered.

In *Eastman Kodak* v. *Masters, Inc.*, 153 N. Y. S. 2d 433 (Sup. Ct., N. Y., 1956), the Court held that Masters, Inc. by handing out in New York the identical advertising, shown as plaintiff's Exhibit B in this suit (GE's App. pp. 1-2), was advertising and offering for sale in violation of the Feld-Crawford Act, without regard to the question of where title to the goods would pass.

This result is dictated by the fact that the plain language of the Feld-Crawford Act, like the language of the McGuire Act, speaks disjunctively as "advertising, offering for sale, *or* selling." See *United States of America* v. *DuPont*, June 3, 1957, Opinion of the Court, p. 4. The result is also dictated by Judge Bicks' finding, not discussed by the Court of Appeals, that "[f]or Feld-Crawford to be anything short of a dead letter, defendant's activities must be held within its terms."

A decision of the highest court of the State of New York construing the Feld-Crawford Act, indicates that the legislature of that state intended to exercise its power to protect the home market to the fullest extent possible, e.g., *Razor* v. *Goody*, 307 N. Y. 229 (1954), and hence the determination by the Court of Appeals that the Feld-Crawford Act is not properly construed as creating a separate tort for advertising within New York goods at prices below those lawful in New York, regardless of the place where title passes, is error.

The Court of Appeals attempted to construe the case of *Razor* v. *Goody* as authority for its position, although admitting that there was no discussion in the case to support this view. In *Razor* v. *Goody*, the question was simply whether the Feld-Crawford Act applied to sales directly into interstate commerce. Since, at that time, forty-five states, including all those contiguous to New York retail markets, had similar legislation or public policy, the problem of sales into a non-fair-trade area was not discussed. Whether New York would construe the Feld-Crawford Act to apply to sales to non-fair trade areas, such as the District of Columbia, was not in issue.

D. The Court of Appeals also failed to consider the relative injury to the policies of the State of New York and the District of Columbia. The activities of Masters Mail Order, it is not disputed, have their economic effect in New York and are by New York standards unfair to New York retailers who are adversely affected thereby, as well as to GE.

The right of the District of Columbia "to regulate its internal affairs" (no doubt protected by the McGuire Act), would not appear to be in the least impaired by prohibiting Masters Mail Order from having its agents in New York hand out mail order forms to New York residents, nor by prohibiting its officers and agents in New York from executing strategy designed to exploit the New York market, by preparing in New York, from lists of New York residents, mail order pieces addressed to New York residents which advertise and offer to sell New York residents, while they remain at all times in New York, GE's commodities at prices prohibited in New York. These activities, and others set forth above, of Masters Mail Order in New York clearly support the application of New York law to Masters Mail Order. Prohibiting the relevant conduct of Masters Mail Order on the undisputed facts in this record cannot fairly be said "to allow New York to dominate the economic activities of the District of Columbia (and other like fair trade areas)" (App. p. 34).

E. The Court of Appeals erred in not adopting the view of the District Court that the place of "resale" and the applicability of state enacted resale price maintenance laws can only be discerned by a fair analysis of all the contacts with the various jurisdictions involved, with particular emphasis on the economic facts and their significance in the transaction.

The McGuire Act and the Reed-Crawford Law relate to economic realities and application of those laws can only be made after consideration of the economic facts. There is no warrant for searching for a test such as the passage of title, a concept developed for deciding risk of loss of goods in transit, and applying that test for the sole purpose of restricting the application of resale price maintenance laws.

The court below attributed to buyer and seller the intention to have title pass in the District of Columbia because otherwise the transaction would have been illegal. In determining the intention of the parties to the transaction, Judge Clark held that proof of the seller's intention that title should pass outside the District of Columbia was irrelevant since the fact to establish this intent was not communicated to the purchaser. In other words, the Court has attributed an intention to the parties and declared that it is irrelevant to prove that one of them did not have this intention.

In *Miller Bros. Co.* v. *Maryland*, 347 U. S. 340 (1954), Mr. Justice Jackson, in discussing *General Trading Co.* v. *State Tax Commission*, 322 U. S. 335, set down pertinent criteria for determining the power of one state to apply its law to sales where title may pass in another.

> "That was the case of an out-of-state merchant entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers, the only nonlocal phase of the total sale being acceptance of the order. Probably, except for credit reasons, acceptance was a mere formality, since one hardly incurs the cost of soliciting orders to reject. The Court could properly approve the State's decision to regard such a rivalry with its local merchants as equivalent to

being a local merchant. But there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. Here was no invasion or exploitation of the consumer market in Maryland. On the contrary, these sales resulted from purchasers traveling from Maryland to Delaware to exploit its less tax-burdened selling market."

It is analysis of this nature, properly applicable to the questions involved, which the Court of Appeals failed to make. It may be noted in passing that, under the test set forth by Mr. Justice Jackson in the above quotation, the rejection by Congress of the Cole Amendment, or at least that portion of it relied upon by Judge Waterman in his discussion of legislative history (App. p. 45), was constitutionally required.

To disregard the active solicitation in the New York market by Master's Mail Order through the use of its New York parent, and to disregard the active invasion and exploitation of the consumer market in New York was error in the court below.

## CONCLUSION

**For the foregoing reasons a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.**

Respectfully submitted,


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# APPENDIX

## The McGuire Act

(Public Law 542; 82nd Cong.; 2nd Sess. (July 14, 1952), c. 745, §2; 66 Stat. 632; 15 U. S. C. 45)

45 (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia,

which in substance provides that wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon or interference with, commerce.

(5). Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act,

1921, except as provided in section 227(b) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

[The purpose of the McGuire Act is stated in Section 1 of the Act, 66 Stat. 632 as follows:]

"That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce."

## The New York Fair Trade Law

(New York General Business Law §369-a et seq.)

## The Feld-Crawford Act

(L. 1935, c. 976, as repealed and reenacted by L. 1940, c. 195, as amended by L. 1941, c. 39, §38; Section 369-a, et seq. of the General Business Law of the State of New York)

**§369-a. Price fixing of certain commodities permitted.**—1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of New York by reason of any of the following provisions which may be contained in such contracts:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor;

(b) That the vendee of producer require any dealer to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

2. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(c) By any officer acting under the orders of any court.

3. This article shall not be deemed or construed to apply to, or to fix or limit prices at which any commodity may be sold or offered for sale to the State of New York or to any administrative department of the state government, to any political subdivision of the state, to any municipality, to any public corporation or authority now or hereafter created by the legislature, to any college or university library or any public library incorporated by an act of the legislature, or by the board of regents of the state education department or registered by the state education department.

§369-b. **Unfair competition defined and made actionable.**—Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

§369-c. **Exceptions.**—This article shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to the sale or resale prices.

**§369-d. Definitions.**—The following terms, as used in this article, are hereby defined as follows: "Producer" means grower, baker, maker, manufacturer or publisher. "Commodity" means any subject of commerce.

**§369-e. Effect of partial invalidity.**—If any provision of this article is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

*Appendix*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 198—October Term, 1956.

(Argued December 4, 1956. Decided May 15, 1957.)

Docket No. 24370

GENERAL ELECTRIC COMPANY,
*Plaintiff-Appellee,*

—v.—

MASTERS MAIL ORDER COMPANY OF WASHINGTON, D. C., INC.,
*Defendant-Appellant.*

Before:

CLARK, *Chief Judge*, and
LUMBARD and WATERMAN,[1] *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Alexander Bicks, *Judge.*

Masters Mail Order Company of Washington, D. C., Inc., appeals from an order, D. C. S. D. N. Y., 145 F. Supp. 57, under the New York Fair Trade (Feld-Crawford) Act, N. Y. General Business Law §§369-a to 369-e, enjoining it from selling, offering to sell, or advertising in New York

[1] Judge Frank heard arguments on this appeal and wrote a memorandum supporting his tentative vote for reversal, but died before he could prepare an opinion. Judge Waterman was then invited to, and consented to, serve as the third member of the panel.

certain trade-marked appliances manufactured by General Electric Company at prices below those specified in the latter's resale price maintenance agreements with New York retailers. Reversed and action dismissed.

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NORMAN DIAMOND, of Arnold, Fortas & Porter, Washington, D. C. (William D. Rogers, of Arnold, Fortas & Porter, Washington, D. C., and Joseph F. Ruggieri, of Ruggieri & Ruggieri, Brooklyn, N. Y., on the brief), *for defendant-appellant.*

EDGAR E. BARTON, of White & Case, New York City (Howard J. Aibel, of White & Case, New York City, on the brief), *for plaintiff-appellee.*

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CLARK, *Chief Judge*:

This is an appeal from a decision, D. C. S. D. N. Y., 145 F. Supp. 57, enjoining a mail order discount house in the District of Columbia from advertising, offering for sale, or selling plaintiff-manufacturer's products in New York below New York "fair trade" prices.[2] The action was brought under the New York Fair Trade (Feld-Crawford) Act, N. Y. General Business Law §§369-a to 369-e, and our jurisdiction rests on the diversity of citizenship of the parties. All the facts were stipulated in advance of trial.

[2] We use the terms which seem to be current, viz., "fair trade," as opposed to "free trade."

## *Appendix*

Since the passage of the McGuire Act, 66 Stat. 632, 15 U. S. C. §45(a)(1)-(5), the plaintiff, General Electric Company, has entered into numerous fair trade agreements with retailers in New York and other states, and has systematically given notice of the agreements and the uniform minimum resale prices in effect to the 175,000 known retailers of its products. It has vigorously enforced the agreements, by lawsuits when necessary. The defendant is a retail store in the District of Columbia which sells General Electric appliances both over the counter, and by mail order. Two-thirds of its sales are over the counter. It is a wholly owned subsidiary of Masters, Inc., a New York retail corporation, and has been controlled and closely supervised by the parent corporation at all relevant times. The parent is not a party here. In 1952 the parent was enjoined from violating the plaintiff's fair trade contracts and the following year it was twice fined for violating the injunction. That year the defendant was organized in Maryland and the following year its place of business was moved to the District of Columbia, where there are no fair trade laws. The last move was intended to permit the defendant to sell General Electric appliances to consumers in fair trade states below fair trade prices by direct mail order, the defendant having been advised that such sales would be legal.

Defendant has shipped General Electric appliances from its store to consumers in New York at prices below those set by the plaintiff with its signatory retailers. These sales were pursuant to orders received in the District of Columbia on order forms marked, "THIS ORDER IS SUBJECT TO ACCEPTANCE BY MASTERS MAIL ORDER COMPANY

IN WASHINGTON, D. C." and "NO CHARGE FOR SHIPPING." Some of the orders were filled on a C.O.D. basis, but the great majority were filled pursuant to orders which were accompanied by prepayment of the purchase price. Each order blank bore the notation "SOLD TO" immediately preceding the purchaser's name, and as one of the terms it announced that the purchaser could return the article purchased for refund or exchange within thirty days of receipt by returning the article in its original condition and carton. In approximately five cases defendant refunded the purchase price upon the customer's return of the merchandise.

The order blanks were distributed by both the defendant in Washington and its parent, which kept them behind the appliance counter at its place of business in New York for distribution to New York consumers who sought them or tried to buy General Electric appliances for less than fair trade prices. To mail requests for appliances below fair trade prices the New York parent store replied that the items could be purchased from the Washington subsidiary, and it enclosed copies of the mail order form of the defendant. Copies of the defendant's catalogue were printed by the parent in New York and sent to the defendant in the District of Columbia, whence they were mailed to prospective customers in fair trade states. And the parent distributed other advertising material concerning the defendant's bargains directly to New York consumers in New York. The appliances sold by the defendant were acquired in part from the parent in New York and in part through purchase from distributors located in the District of Columbia, including a division of General Electric Supply Company, a wholly-owned subsidiary of the plaintiff, which

is one of seven franchised General Electric distributors in the District of Columbia.

The district court, relying heavily on the circumstances surrounding the formation of the defendant and its close supervision by the New York parent, held that the defendant advertised, offered for sale, and sold GE appliances in New York below the fair trade prices; that this violated New York's Feld-Crawford Act; and that the Feld-Crawford Act was sanctioned by the McGuire Act. Judge Bicks' reasoned opinion, reported at 145 F. Supp. 57-64, is a full exposition of the arguments available for plaintiff's position and for the rather far-reaching injunction he issued. He distinguished two earlier district court cases upholding the legality of the defendant's operations in another fair trade jurisdiction on the ground that there no sales had been made within a fair trade state. *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co. of Washington, D. C.*, D. C. D. Md., 140 F. Supp. 165, subsequently affirmed, 4 Cir., 240 F. 2d 684; *Revere Camera Co.* v. *Masters Mail Order Co. of Washington, D. C.*, D. C. D. Md., 128 F. Supp. 457. But we are constrained to agree with these decisions, which we think are not properly to be distinguished.

Our first question is whether the Feld-Crawford Act, so applied, conflicts with the Sherman Antitrust Law's ban on enforcement of resale price maintenance agreements as to goods moving in interstate commerce. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373. Although the McGuire Act carves some exceptions to this long-standing national policy against restraints on trade, we are "bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy." *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305, 316.

*Appendix*

Subsections (a)(2) and (3) of §2 of the McGuire Act, 15 U. S. C. §45(a)(2) and (3), are printed in the margin.[3] The last part of subsection (a)(2) restricts the exception for resale maintenance contracts to contracts governing resales in jurisdictions that have adopted "fair trade" as a policy. A contract made in a fair trade state, but governing a resale in a non-fair trade state, would be illegal by the terms of the subsection. Subsection (a)(3) creates an exception for enforcement actions only when the price-cutter is undercutting "prices prescribed in such contracts"—that is, the contracts described in the previous subsection. Therefore no enforcement action lies unless the resales in question occur in a fair trade state.

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[3] "§45. *Unfair methods of competition unlawful; prevention by Commission.*

"(a)(1) * * *

"(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

"(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby."

This was the construction given the statute by Judge Chesnut in *Revere Camera Co.* v. *Masters Mail Order Co. of Washington, D. C., supra,* D. C. D. Md., 128 F. Supp. 457, 462, and by Judge R. Dorsey Watkins in *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co. of Washington, D. C., supra,* D. C. D. Md., 140 F. Supp. 165, 178; and see also the opinion of Judge Soper affirming the latter decision, 4 Cir., 240 F. 2d 684. This construction is supported by the legislative history of the McGuire Act, carefully detailed in these opinions.

Plaintiff protests that our reading of the statute will allow the District of Columbia to impose its policies on economic activities in New York. But the opposite construction will simply allow New York to dominate the economic activities of the District of Columbia (and other like free trade areas). Since Congress has left the regulation of this part of interstate commerce to the option of the individual states, it is inevitable that when a single transaction affects states with conflicting policies one state or the other must see its policies slighted. We have no clearer guide in choosing the dominant state than the language of the statute itself. The trial judge attempted to weigh the defendant's contacts in New York against its contacts in the District, but this approach has no warrant in the congressional language or legislative history.[4] From all that appears Congress was concerned with the place where resales occurred, rather than the place where the

[4] Its weakness from a realistic point of view is highlighted by the fact that here more than two-thirds of defendant's sales were made over the counter in its extensive three-story store in the District, while the remaining or mail-order sales were by no means limited to New York customers; witness the two federal cases in Maryland that we have cited which also involve this defendant.

retailer's owner resided and exercised supervision over operations.

Nor do we think that advertisements and offers to sell are to be treated differently from sales themselves. The critical question is still the place of resale, and no enforcement action may be brought for advertising or offering goods for sale below fair trade prices unless the ad or offer contemplated resales in a fair trade jurisdiction. There is a practical advantage to having all three stages of the seamless process of merchandising governed by the same law, and the wording of the McGuire Act suggests that the three are to be handled together. This was the conclusion of Judge Watkins in *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co. of Washington, D. C., supra*, D. C. D. Md., 140 F. Supp. 165, affirmed 4 Cir., 240 F. 2d 684, noted in 57 Col. L. Rev. 292; and we are in entire agreement with his comprehensive opinion. Hence an enforcement action under the New York statute is valid only if the resales occurred in New York.

The parties disagree as to whether the defendant's order blanks were offers or only advertisements soliciting offers. Plaintiff views them as offers which were accepted when consumers in New York signed them and put them in the mail. Defendant contends that the consumers' actions were the real offers which the defendant accepted in the District. We need not resolve the dispute, since Judge Waterman and I are agreed that the place where the contract was made is not controlling. In my view the place where title passed is critical.

The intent of the parties governs the passage of title between them, although statutes and case law provide guides for ascertaining such intent. Here the predominant

interest of both the seller and buyers was to take advantage of the absence of resale price maintenance legislation in the District of Columbia. The defendant's history and operations testify to its concern, and its various pieces of advertising brought home the same desire to New York consumers. For example, one of its order blanks announced "discounts on all the 'fair-traded' brands of merchandise that are being sold only at list price in 45 states." Since the parties had the power to determine for themselves where title would pass, they indubitably selected the District of Columbia, where their agreements would be enforceable, rather than New York, where they would not.

Where there is no contrary evidence, the fact that the seller pays the carrier suggests that title is intended to pass when the carrier delivers the goods to the buyer, Uniform Sales Act §19, Rule 5; but only slight evidence of a contrary intent rebuts the presumption of this rule. Williston, Sales §279b (Rev. Ed. 1948). Here the cost of transportation was being passed on to the mail order consumer in any event, so that little is to be inferred from the fact that the seller's catalogue price included the cost of transportation, instead of treating it as a separate item which the customer must also prepay. The customers' prepayment of the price is more evidence that title passed before the buyer received the goods. *Madeirense Do Brasil S/A* v. *Stulman-Emrick Lumber Co.*, 2 Cir., 147 F. 2d 399, 402, certiorari denied 325 U. S. 861, and the vast bulk of mail order sales were thus prepaid.

But even the C.O.D. sales were made in the District of Columbia, we feel. C.O.D. customers, as well as customers who prepaid, placed their orders on blanks which proclaimed the advantages of sales in the District of Columbia;

and they, too, if asked, would have expressed a desire to pass title in a place where it was legal. Nor would the defendant be prejudiced by passing title before payment, for it could retain a seller's lien, entitling it to keep possession of the goods until paid. See *Rosiler v. Beeler Motor Co.*, 186 Okl. 88, 96 P. 2d 65. Defendant's failure to pay the District of Columbia sales tax is irrelevant to the intent of the parties, since this fact was never communicated to purchasers. Under the defendant's arrangement for doing business, title passed in the District of Columbia. *Revere Camera Co.* v. *Masters Mail Order Co. of Washington, D. C., supra*, D. C. D. Md., 128 F. Supp. 457, 462; *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co. of Washington, D. C., supra*, D. C. D. Md., 140 F. Supp. 165, 174, affirmed 4 Cir., 240 F. 2d 684.

Quite apart from the McGuire Act, the same result is compelled by New York law. Sec. 369-b of New York's Feld-Crawford Act, N. Y. General Business Law,[5] cannot be distinguished from the Maryland Fair Trade Act, which the Court of Appeals for the Fourth Circuit recently construed. *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co. of Washington, D. C., supra*, 4 Cir., 240 F. 2d 684. A unanimous court of appeals agreed with the two district judges earlier construing the Act that it covered only those advertisements and offers which referred to resales in Maryland. This narrow construction was adopted because the statute was in derogation of the common law and in

[5] "§369-b. *Unfair competition defined and made actionable*

"Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

posed a burden on interstate commerce—considerations which would weigh heavily with New York courts, as well, e.g., *General Electric Co.* v. *R. H. Macy & Co.*; 199 Misc. 87, 95-96, 103 N. Y. S. 2d 440, 449, appeal dismissed 278 App. Div. 939, 105 N. Y. S. 2d 1003.

Moreover, it seems apparent that New York would apply the substantive law of the District of Columbia to the facts of this case. Whether it regarded the place where title passes as critical (to keep the Feld-Crawford Act consistent with the McGuire Act) or saw the retailer's location as controlling, the result would be the same here. In an action for unfair competition by a manufacturer against a New York retailer engaged in direct-mail sales of fair-trade items to out-of-state consumers the New York courts have applied New York law without discussing our present problem. *Raxor Corp.* v. *Goody*, Sup., 121 N. Y. S. 2d 882, affirmed 282 App. Div. 921, 125 N. Y. S. 2d 643, affirmed 307 N. Y. 229, 120 N. E. 2d 802, certiorari denied *Goody* v. *Raxor Corp.*, 348 U. S. 863. The instant case is almost identical except that the retail store is located in the District of Columbia; and there is no reason to suspect that the New York courts, which have been scrupulous to apply principles of comity, would adopt a different conflicts rule here merely in order to govern all multi-state transactions by New York law, e.g., *People ex rel. Kirkman* v. *Van Amringe*, 266 N. Y. 277, 194 N. E. 754; *Van Voorhis* v. *Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505. The fact that the defendant's owner is located in New York is as irrelevant under the Feld-Crawford Act as under the McGuire Act; the state judges will not distinguish between two mail order houses located in the District of Columbia solely because the owner of one resided in

New York and the owner of the other lived in Florida.[6] That construction would invite serious enforcement problems, since service of process on the Florida owner cannot be made in New York on the mere fact of advertisement in New York; and the courts of Forida might refuse to entertain actions for unfair competition under the Feld-Crawford Act on grounds of public policy. See Note, 57 Col. L. Rev. 292, 296.

My brother Watermaii criticizes use of the concept of title in determiaing the place of "resale" and suggests that we look instead to the situs of the retailer. The title approach seems required by the congressional language and the case law; in reality it adds precision to the statutory term by drawing upon precedents from the law of sales, e.g., *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co. of Washington, D. C., supra*, D. C. D. Md., 140 F. Supp. 165, 172, note 12, where Judge Watkins relied on a state case involving passage of title in finding that the defendant's resales are made in the District of Columbia. I see no difficulty with this construction, but am convinced that the novel retailer-situs rule would introduce much uncertainty into the law. For example, it would be difficult to know how much paraphernalia a seller must have in a state to be "located" there. Similarly, it would be hard to fix the "location" of a large mail order house which has numerous warehouses and retail outlets in both free trade and fair trade states.

The criticisms of the construction here employed are two: that it facilitates evasion of fair trade regulation and

[6] Florida is one of the twelve states where resale price maintenance legislation has been declared invalid either in whole or in part by the state courts. See 1 CCH Trade Reg. Rep. ¶3,093; Sievert, "'Fair Trade' Tottering, But Hope Still Lingers," N. Y. World-Telegram and Sun, Feb. 22, 1957.

that it may create inconsistencies between the McGuire Act and the state fair trade laws. Obviously some manipulation is possible under both approaches. The one here adopted would permit no more latitude than the familiar doctrine that parties to a multi-state contract can agree as to which state's law will govern, provided the state selected has a direct and substantial relation to the transaction. *Seeman* v. *Philadelphia Warehouse Co.*, 274 U. S. 403; 6 Corbin on Contracts §1509 (1951). Of course the parties, under well recognized principles set forth in more detail in the footnote, are limited in their choice of law as to the passage of title, and cannot elect to be governed by the law of some jurisdiction with which they have no connection.[7] Consequently any fear that New York retailers and consumers can subject local sales to foreign fair trade laws is groundless. Inasmuch as Judge Watkins has already read the title concept into the federal and Maryland

[7] "[T]he parties may elect between the different systems of law, which the law would construe as competing systems; but they cannot elect the law of any other jurisdiction." 6 Page, Law of Contracts §3571. "The courts have * * * generally confined the parties in their choice of law either to the law of the place of making or to the law of the place of performance." 2 Beale, Conflict of Laws 1081. "It is almost universally held that the parties, in exercising the power to select the jurisdiction whose law they intend to have control the obligations, rights, and duties under their contract, must act in good faith and with no purpose of evasion or of avoiding some provision of the law of the place of making." *Owens* v. *Hagenbeck-Wallace Shows Co.*, 58 R. I. 162, 192 A. 158, 164. See also *E. Gerli & Co.* v. *Cunard S.S. Co.*, 2 Cir., 48 F. 2d 115, *Brierley* v. *Commercial Credit Co.*, 3 Cir., 43 F. 2d 730, certiorari denied 282 U. S. 897; *Palmer* v. *Chamberlin*, 5 Cir., 191 F. 2d 532, 536, 27 A. L. R. 2d 416; *Duskin* v. *Pennsylvania-Central Airlines Corp.*, 6 Cir., 167 F. 2d 727, 730, certiorari denied *Pennsylvania-Central Airlines* v. *Duskin*, 335 U. S. 827; *In re Sil's Estate*, 205 Misc. 715, 129 N. Y. S. 2d 134; Annotation, Validity and effect of stipulation in contract to the effect that it shall be governed by the law of a particular state which is neither the place where the contract is made nor the place where it is to be performed, 112 A. L. R. 124

statutes in *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co. of Washington, D. C.*, *supra*, D. C. D. Md., 140 F. Supp. 165, and the only possibly contrary authority is *Razor Corp* v. *Goody*, *supra*, where the law of the forum was applied without discussion, it seems most likely that uniformity will come about as the state courts read the title concept into their statutes to make them agree with the federal act from which their validity is derived. Congressional disapproval of *Sunbeam Corp.* v. *Wentling*, 3 Cir., 185 F. 2d 903, vacated 341 U. S. 944, does not bear on the present controversy nor does it lend support to the retailer-situs construction.

Because Judge Frank died before casting his final vote, his views on this case are not official; but it is reassuring that his memorandum and tentative vote agreed so closely with the views I have expressed in calling for reversal on both state and federal grounds and in suggesting that we might reverse on the "persuasive and exhaustive" district court opinions in *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co. of Washington, D. C.*, *supra*, D. C. D. Md., 140 F. Supp. 165, and *Revere Camera Co.* v. *Masters Mail Order Co. of Washington, D. C.*, *supra*, D. C. D. Md., 128 F. Supp. 457. In accordance with those views the order of injunction must be reversed and the action must be dismissed on the merits.

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WATERMAN, *Circuit Judge* (concurring):

I concur in the result reached by Judge Clark. With him I hold that New York's Feld Crawford Act is unenforceable against Masters Mail Order Company of Wash-

ington, D. C., Inc., the defendant here. Masters is located in the District of Columbia where there is no resale price maintenance statute, law, or public policy. The prices Masters receives for goods sold by it to New York purchasers, being goods shipped in interstate commerce, are, I believe, governed by the public policy of the District of Columbia, the state where Masters is located. That policy permits free-pricing. The public policy of New York that restrains free-pricing in favor of agreements of resale price maintenance I hold is inapplicable to retail transactions of sale made in interstate commerce by this District of Columbia retailer; for I believe that for the purposes of the McGuire Act, 15 U. S. C. A. §45(a) (1952), all such sales take place in the District of Columbia. I reach this conclusion from my reading of the McGuire Act and my understanding of the intent of Congress in passing that legislation. Hence, although Judge Clark and I agree in reversing the lower court, I differ somewhat from him in reaching that decision.

In enacting the McGuire Act, 15 U. S. C. A. §45(a) (1952), the Congress indicated its intention to leave the adoption or rejection of resale price maintenance to the individual states. The states' rights basis of this legislation clearly appears in the preamble of the Act:

> "That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose

of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce."

To carry out this purpose, the McGuire Act provides that the applicable state law shall be that "* * * in effect in any State, Territory, or the District of Columbia in which such resale is to be made * * *" I think we must interpret this language in a way that will most effectively implement the intent of Congress to permit the individual states to adopt or reject "fair-trade" laws and then to enforce those laws in the event of their adoption. We should not interpret the language to permit the policy of more than one state to affect the transaction of sale; or to permit parties to the sale to "contract out" of the applicable state law or to "pick a state law" to suit their convenience. Since the place of resale is not defined by the Act, if we construe that phrase to mean the place where the seller of the goods is located, we obtain the certainty we seek consistent with the intent of Congress to preserve the rights of individual states to regulate in this field; and we do so by an interpretation clearly reasonable from the language of the Act.

I find support for my position in the legislative history of the McGuire Act. During the debates in Congress preceding its enactment, Congressman Cole of Kansas offered an amendment allegedly designed to protect retailers located in fair trade states from competition from outside those states, and to prevent, "raids on the part of mail order houses and cut rate retailers and wholesalers in non-fair-trade states." 98 Cong. Rec. 4952 (1952). That amendment, insofar as here relevant, provided:

"Whenever by contract or agreement described in subsection (2) a stipulated or minimum resale price may be established for a commodity in any State, Territory, or the District of Columbia, where such a contract or agreement is lawful, it shall be an act of unfair competition actionable at the suit of any person damaged thereby, to wilfully and knowingly, in interstate commerce (1) sell or (2) have transported for sale or resale or (3) *deliver pursuant to a sale, or otherwise deliver*, such commodity in any such State, Territory, or the District of Columbia, where such a contract or agreement is lawful, at less than the price or prices so established in such contract or agreement." 98 Cong. Rec. 4952 (1952) (Emphasis added.)

This amendment was vigorously opposed by Congressman Patman of Texas, who pointed out that a retailer located in a free-pricing jurisdiction like Texas would be prevented from selling to nearby customers who resided in a fair-trade state at less than the fair-trade prices maintained in the latter jurisdiction. 98 Cong. Rec. 4958 (1952). Such interference with the pricing policy of a retailer located in a free-pricing jurisdiction would be "entirely contrary to the [States' right] concept we have in advocating the McGuire bill." The Cole Amendment, he pointed out, would place "a burden upon the merchants in those States where they have no fair-trade law."

The Cole Amendment was rejected by the House of Representatives, which passed the McGuire Act in its present form. 98 Cong. Rec. 4956 (1952). However, in addition to criticism such as that of Congressman Patman, many Congressmen apparently opposed the Cole Amendment because it created a federal cause of action. See, *e.g.*, remarks of Congressman Harris, of Arkansas, 98 Cong. Rec.

4954 (1952). Hence the defeat of that Amendment can be explained on several grounds. Nevertheless, the absence of the controversial phrase, "(3) *deliver pursuant to a sale, or otherwise deliver*," quoted above, is support for my belief that the Congress intended that a retailer should be governed only by the fair-trade law of the jurisdiction in which he is located.[1]

I also find authority for my position in court decisions. Prior to the passage of the McGuire Act, the Third Circuit had held that a resale by a retail mail order house located in Pennsylvania was not exempt from the Sherman Act, and therefore not within the reach of the Pennsylvania fair-trade law, if the resale was to a customer residing outside Pennsylvania. *Sunbeam Corp.* v. *Wentling*, 185 F. 2d 903 (3d Cir. 1950). When Congress created the McGuire Act, it indicated that one of its express purposes was to "overrule" the *Wentling* decision, and to permit the individual states to apply their fair-trade laws to interstate shipments such as those involved in *Wentling*. See H. R. Rep. 1437, 82d Cong., 2d Sess. 6 (1952). And subsequent to the passage of the McGuire Act several courts have held that interstate shipments are within the reach of the fair-trade law of the state where the seller is located, thereby implying that the resale contemplated by the McGuire Act takes place in that state. See, e.g., *General Electric Co.* v. *Masters, Inc.* (*Razor Corp.* v. *Goodij*), 307 N. Y. 229, 120

[1] This phrase was separable from the provisions of the Cole Amendment providing for a federal cause of action. Being so separable, it could easily have been inserted in the McGuire Act which leaves enforcement to the several states. It is a fair conclusion, therefore, that in situations where the transaction is in interstate commerce Congress did not intend to permit the state in which the goods are delivered to be able to enforce its local resale price maintenance statute.

N. E. 2d 802 (1954); *cert. denied*, 348 U. S. 863; *Sunbeam Corp. v. MacMillan*, 110 F. Supp. 836 (D. Md. 1953).

To also permit the state of ultimate destination where the consumer resides to apply its fair-trade law to such interstate transactions as those now before us would logically require a holding that under the McGuire Act a resale can take place in *two* jurisdictions. It is my belief that the Congress did not intend that New York State can enforce its Feld-Crawford Act both against resident sellers, as has been done in *Baror Corp. v. Goody*, and also against a non-resident seller as by the decision below. For such an anomalous result I find no authority in the language or history of the McGuire Act. In fact, its somewhat equivocal legislative history tends to support the opposite conclusion, that the seller is subject to the applicable law of but one state. See 98 Cong. Rec. 4952-54 (1952); *Revere Camera Co. v. Masters Mail Order Co.*, 128 F. Supp. 457, 463 (D. Md. 1955); *Bissell Carpet Sweeper Co. v. Masters Mail Order Co.*, 440 F. Supp. 165, 170-78 (D. Md. 1956), *aff'd*, 240 F. 2d 684 (4th Cir. 1957).

In view of my understanding of the McGuire Act, I do not find that the New York Feld-Crawford Act has any applicability to the situation before us here. Congress, in passing the McGuire Act, exempted resale price maintenance agreements from the coverage of the federal anti-trust laws by permitting the individual states to enact fair-trade legislation. But that exemption can be availed of only by the state that the McGuire Act designates as the state of resale, *i.e.*, the state where the retailer is located. Hence the New York Feld-Crawford Act, in my judgment, cannot be enforced against this defendant, located in the District of Columbia, on the facts in this case; and, as

pointed out by Judge Clark, the fact that the defendant is owned by a resident of New York State does not make that Act any more applicable to it than if the defendant were owned by a resident of some other state.

And I agree with Judge Clark that the New York contacts of the defendant stressed by the trial court also are irrelevant to our problem of construing the McGuire Act. Nor do I see any reason for treating the defendant as a mere dummy corporation for its New York parent. The defendant conducts an extensive retail business in Washington and must be regarded as a separate corporate entity, selling the plaintiff's merchandise in that jurisdiction.

Judge Clark interprets the language of the McGuire Act to make the resale price maintenance statute, if any, of the state where the title passes to goods sold in interstate commerce the only state statute applicable to the transaction. Such an interpretation of that Act permits sellers and buyers to "pick their own law," despite the law of the state where one or both of them may be located.

Clearly a sale or contract of sale can be made in one place and passage of title to the goods being sold may occur elsewhere. Moreover, the place where, or the time when, the title passes can be arranged at the will of the parties. Thus under the approach adopted by Judge Clark it would be possible, despite *Rayor* v. *Goody*, *supra*, for a seller located in a fair-trade jurisdiction to avoid the application of the fair-trade law of that state by arranging for title to pass in a non-fair-trade jurisdiction where the buyer was located. Or by agreement of the parties, even though both seller and buyer reside in the same or in different fair-trade jurisdictions, title to the goods being sold can be arranged to pass in a free pricing jurisdiction

if the jurisdiction chosen has a direct and substantial relation to the transaction.

Judge Clark would point out that if my interpretation of the McGuire Act is adopted it will be difficult in future cases "to know how much paraphernalia a seller must have in a state to be 'located' there." Surely, realistic criteria for determining the location of a retailer will logically develop as the future cases may require that development. I would here hold only that *this* defendant-retailer is located within the District of Columbia and therefore beyond the reach of the fair trade law of New York. That is the issue before us to decide.

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LUMBARD, *Circuit Judge* (dissenting):

I dissent for the reasons so well stated by Judge Bicks below, 145 F. Supp. 57 (S. D. N. Y. 1956). The sales complained of took place in New York and New York may prohibit them. Accordingly the district court had the power and the duty to enjoin these New York sales, offers to sell and advertising.

Masters, Inc. of New York has frequently been before the New York courts for violation of the Feld-Crawford Act. In 1952, Masters, Inc. was enjoined from selling General Electric appliances below fair-traded prices, 122 N. Y. S. 2d 14 (Sup. Ct. N. Y. 1952); and in 1953 was fined twice for violating the injunction. Not long thereafter, it set up in the District of Columbia (the nearest Metropolitan area without Fair Trade laws) a store which was separately incorporated, although wholly owned and controlled by Masters, Inc.

Despite the formal corporate separation, Masters, Inc. used the facilities of both the New York and Washington stores to exploit the New York market.[1] Thus, Masters, Inc. widely advertised that although it could not sell General Electric appliances at its New York store, it could and would sell them by mail order from Washington, D. C. When customers sought to buy the appliance at the New York store, they were again informed that the appliances could be obtained at the Washington store and order blanks were provided in New York; moreover the advertising mailed by Masters Mail Order of Washington, D. C., although posted in Washington, was prepared in New York from the mailing lists and other facilities of the New York office.

"It seems to me that it would be difficult to imagine a clearer case of evasion of the New York law. Regardless of how we ought to treat the wholly independent out-of-state mail order house, it seems to me, with all due deference to my brethren, that that is not the case before us. Insofar as the sales in question are concerned, the many contacts with New York establish that for all practical purposes the Masters organization is in the same position as a New York seller with an out-of-state warehouse and office staff. If we ignore that and look only to such easily arranged formalities as separate incorporation, title passage and where the article is mailed, we merely facilitate the emasculation of fair trade by any discount house large

[1] Masters Mail Order of Washington, D. C. did most of its business in across the counter sales, but I think that that is immaterial to the issues before us since our concern is only with the substantial mail-order sales to the New York market.

enough to be able to afford such arrangements.[2] These formalities may be material in other contexts, but they should not be given controlling significance here.

We must not forget that Congress has twice indicated—the second time despite strong opposition—that the states are to be allowed to prevent price-competition among those selling branded products in the home market. See H. R. Rep. No. 1516, 82d Cong. 2d Sess. (1952). This was to avoid damage to the good will of the manufacturer in the eyes of local consumers and to protect local small businessmen against the price-cutting powers of the large firms. See *id.* at 12, 10. The defendant's activities have frustrated and will continue to frustrate both purposes in the New York market unless they are enjoined.[3]

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[2] Stress on title passage seems to me to be particularly unfortunate, for that would allow even a wholly in-state retailer to evade his state's fair trade law when selling to an out-of-state consumer by merely arranging that title pass in a free-trade state with some relevant contacts.

[3] *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co. of Washington, D. C.*, 140 F. Supp. 165 (D. C. Md. 1956), aff'd 240 F. 2d 684 (4 Cir. 1957) does not seem to me to be persuasive authority for a contrary result as to the McGuire Act since that dealt primarily with the Maryland statute. Nor is the decision of much assistance in construing the Feld-Crawford Act, for despite the similarity of language between the Maryland and New York acts, the New York legislature and the New York courts have already firmly indicated an intent to protect the home market as much as possible. See *Kavar Corp.* v. *Goody*, 307 N. Y. 229 (1954), cert. denied, 348 U. S. 863 (1954) and *Eastman Kodak Co.* v. *Masters, Inc.*, 153 N. Y. S. 2d 433 (Sup. Ct. N. Y. 1956). Moreover, in *Bissell* we do not have the many contacts by the seller with the fair trade state which make the transactions before us sales in New York for all practical purposes.